

No.

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DASHAWN LEWIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

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On Petition for Writ of Certiorari to the  
Ninth Circuit Court of Appeals

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether the last sentence of the Ninth Circuit's pattern jury instruction on reasonable doubt, telling jurors that "if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your *duty* to find the defendant guilty" is an incorrect statement of the law and is akin to a directed verdict?

## **RELATED PROCEEDINGS**

United States District Court

*United States v. Lewis*, CR-20-184-CJC (C. D. Cal.)

Ninth Circuit Court of Appeals

*United States v. Lewis*. Ninth Circuit No. 21-50229

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**PETITION FOR WRIT OF CERTIORARI**

Petitioner Dashawn Lewis respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on February 14, 2023. The decision is unpublished.

**OPINION BELOW**

On February 14, 2023, the Court of Appeals entered its decision affirming Lewis's drug trafficking and firearm convictions. (Appendix A.) The petition for rehearing was denied on April 5, 2023. (Appendix B.)

## **JURISDICTION**

On February 14, 2023, the Court of Appeals affirmed Petitioner's convictions. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition for rehearing was denied on April 5, 2023. (Appendix B.) This petition is due for filing on July 4, 2023. Supreme Court Rule 13. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

### **Fifth Amendment (partial)**

“No person shall be deprived of ... liberty ... without due process of law”

## **STATEMENT OF THE CASE**

After a jury trial, Petitioner was convicted of drug trafficking (possession of fentanyl precursor chemical) [21 U.S.C. § 841(a)(1) and (b)(1)(C); carrying a firearm in relation to drug trafficking [18 U.S.C. § 924(c)(1)(A)(i)]; and possession of ammunition by convicted felon [§ 922(g)(1)]. He was sentenced to 96 months in prison.

On appeal, Petitioner argued, *inter alia*, that the last sentence of the Ninth Circuit pattern reasonable doubt instruction (No. 6.5) was an incorrect statement of the law and akin to a directed verdict. Because there was no objection below, the issue was raised as one of plain error.

The instruction states:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from a lack of evidence.

If after a careful and impartial consideration of all the evidence you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. *On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.*

(CR 68, 1-ER-93-94, emphasis added.)<sup>1</sup>

Petitioner argued that the last sentence of the instruction, telling the jurors that they have a duty to convict the defendant if they are convinced beyond a reasonable doubt that he is guilty, is an incorrect statement of the law. To the contrary, “A juror’s ability to acquit “in the teeth of both law and facts” is a “well-established power” that “has been with us since Common Law England.” *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005) citing *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920). See also *Bushell’s*

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<sup>1</sup> “CR” stands for Clerk’s Record. “RT” stands for Reporter’s Transcript. “ER” stands for Excerpts of Record.

*Case*, 124 Eng. Rep. 1006 (C.P. 1670) (releasing jury foreman Bushell, who was arrested for voting to acquit William Penn of unlawful assembly against the weight of the evidence and the requirements of the law). “The power to nullify is reenforced by a jury’s freedom from recrimination or sanction for exercising this power after the verdict has been reached.” *Merced*, at 1079.

In addition to the courts’ duty to safeguard the secrecy of the jury deliberation room … the several rules protecting the unassailability of jury verdicts of acquittal … serve to ‘permit [] juries to acquit out of compassion or compromise or because of their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

*Merced*, 426 F.3d at 1079, citing *United States v. Thomas*, 116 F.3d 606, 615 (2nd Cir. 1997) and *Standifer v. United States*, 447 U.S. 10, 22-23 (1980).

Petitioner further argued even though defendants have no right to a nullification instruction, *Merced*, 426 F.3d at 1079, Ninth Circuit Model Instruction 6.5 told the jurors something that was not accurate. As such, the instruction was akin to a directed verdict.

It is well settled that “a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with a verdict … regardless of how overwhelmingly the evidence may point in that direction.”

*Connecticut v. Johnson*, 460 U.S. 73, 84 (1983) citing *United States v. Martin Linen Supply*, 430 U.S. 564, 572-573 (1977); *Carpenters v. United States*, 330

U.S. 395, 408 (1947); and *Sparf and Hansen v. United States*, 156 U.S. 51, 105 (1895)

A judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions ... or on an actual authorization or ratification of such acts ..... A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction.

*Carpenters*, 330 U.S. at 408-409.

Because the last sentence of the instruction is akin to directing a verdict, Petitioner argued that the error is a structural defect in the trial mechanism, which is *per se* reversible. *Rose v. Clark*, 478 U.S. 570, 578 (1986). Given that a directed verdict and a faulty reasonable doubt instruction are both *per se* reversible errors, the failure to object is plain error affecting substantial rights. *See Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993) (faulty reasonable doubt instruction *per se* reversible).

The Ninth Circuit agreed that “a jury can acquit a defendant, even though the government proved guilt beyond a reasonable doubt, through nullification.” Appendix A at 5, citing *United States v. Powell*, 955 F.2d 1206, 1212-13 (9th Cir. 1991). However, because trial courts have a duty to forestall or prevent nullification, an instruction telling the jury to follow the law is proper. *Id.*

The panel characterized the issue as one of anti-nullification, which did not imply that the jury could be punished for nullification. Appendix A at 5, citing *United States v. Kleinman*, 880 F.3d 1020, 1032 (9th Cir. 2017). The instruction did not tell the jurors that nullification would place them at risk or tell them they lacked the actual ability to nullify. *Id.* at 5-6.

Judge Collins concurred on a “narrower ground, that even assuming that the instruction was erroneous, Petitioner has not shown that reversal is warranted.” Appendix A at 7. *Kleinman* rejected the argument that an erroneous anti-nullification instruction amounts to structural error. Appendix A at 8. Petitioner “per-se reversal theory is contrary to *Kleinman*” and he had not made any case-specific showing to pass the plain error test. Appendix A at 9.

**REASONS FOR GRANTING THE WRIT**

**THE NINTH CIRCUIT IS THE ONLY CIRCUIT THAT HAS AN**

**INSTRUCTION TELLING JURORS THEY HAVE A “DUTY” TO**

**CONVICT**

This Court should grant certiorari because the last sentence of the Ninth Circuit pattern reasonable doubt instruction telling the jurors they

have a “duty” to convict is akin to a directed verdict. The court below did not address that portion of Petitioner’ argument.

Prior to the reasonable doubt instruction, the jury was instructed per Ninth Circuit pattern instruction 6.1 (Duties of Jury to Find Facts and Follow Law) that: “It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not.” (5 ER 555.) This instruction already tells the jurors they have to follow the law.

But the last sentence of the reasonable doubt instruction tells the jurors something that is not correct – they do not have a duty to convict even if the prosecution proves guilt beyond a reasonable doubt. There is no dispute about this. Telling jurors that they must convict is akin to a directed verdict was recognized by this Court as far back as 1920.

In *Horning v. District of Columbia*, *supra*, 254 U.S. 135, the defendant was a pawnbroker who was convicted of charging more than six percent interest without a license. The judge instructed the jury that the issue came down to which witnesses were telling the truth. The next day the judge told the jury that “there really was no issue of fact for them to decide” and that the witnesses for the government were telling the truth. *Id.* at 138. The judge also said that “in a criminal case the Court could not peremptorily

instruct them to find the defendant guilty but that if the law permitted he would.” *Id.*

In a 5-4 opinion, the majority held that the judge has a duty to tell the jurors what the law is. Nevertheless: “The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts.” *Id.* The majority upheld Horning’s conviction because “there was no doubt of his guilt.” *Id.* at 139.

Justice McReynolds dissented. Justice Brandeis, joined by Chief Justice White and Justice Day, wrote a dissent which found that the trial judge “usurped the province of the jury.” *Id.* 140.

Since *Sparf v. United States*, 156 U.S. 51, it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find. But it is still the rule of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and the judge is without power to direct a verdict of guilty although no fact is in dispute.

*Id.* at 139.

A directed verdict is structural error which is *per se* reversible. *Rose v. Clark*, 478 U.S. 570, 578 (1986). This Court should decide whether instructing the jury that it has a “duty to convict” if the government proves guilt beyond a reasonable doubt is directing a verdict, as Justice Brandeis would hold.

At a minimum this Court should determine whether the last sentence of the pattern jury instruction should be stricken. The Ninth Circuit is the only circuit that has a pattern jury instruction telling jurors they have a “duty” to convict.

The First (1.01, duties of the jury) and the Third Circuits (3.06, presumption of innocence, burden of proof, reasonable doubt) instruct that if the government proves its case beyond a reasonable doubt the jurors “should” find the defendant guilty. The Fourth (G. presumption of innocence) and the Tenth Circuits (1.05 presumption of innocence, burden of proof, reasonable doubt) instruct that the jurors “must” find the defendant guilty. The Sixth Circuit instructs that if the jurors are convinced of guilt, they should “say so by returning a guilty verdict.” (1.03, presumption of innocence, burden of proof, reasonable doubt).

The Second, Fifth, Seventh, Eighth, and Eleventh Circuits have no pattern instruction telling the jurors that they “should” or “must” convict.

There is a critical difference between telling jurors they have a “duty” to convict – which they definitely do not – and telling them they “should” or “must” convict, which is another way of telling them to follow the law. However, telling the jurors that they have a “duty” to convict appears to

imply that the jury would be punished if it did not convict. *Kleinman*, 880 F.3d at 1032.

The critical issue is not whether this sentence is an anti-nullification instruction, but whether it directs a verdict, which is quite different. As Justice Brandeis wrote in his dissent, to give such an instruction should be reversible error. *Horning*, 254 U.S. at 140.

This is the perfect case to decide this important issue.

## **CONCLUSION**

For the reasons expressed above, Petitioner Lewis respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: June 16, 2023      Respectfully submitted,

VERNA WEFALD

*Counsel of Record*